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## ADR in a Virtual World: Here Today and Likely for the Foreseeable Future

By Cassandra Franklin

### A Look at the Past

Mediation and other forms of alternative dispute resolution (ADR) have existed in other cultures for a very long time, in some serving as the principal means of resolving disputes. However, in the early United States, common law courts were the primary means of resolving disputes. As the 19th century drew to a close, “popular dissatisfaction with the legal system and its administration of justice” began to rise. In his address to the American Bar Association (ABA) in 1906, Dean Roscoe Pound expressed this concern in a bleak commentary:

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected



to yield to its spirit when their interests are served by evading it. . . Thus the courts, instituted to administer justice according to law, are made agents or a bettors of lawlessness.

By the 20th century, alternatives to resolution in court began to appear. In the early 1900s, “facilitated negotiation” took hold during the labor movement. By the 1970s, it had become prevalent in other areas, such as the civil rights

movement. Gradually, the use of ADR expanded into the commercial arena, where contractual provisions making ADR a prerequisite to, or a replacement for, redress via the courts became increasingly prevalent.

Additionally, legislatures passed statutory schemes supporting mediation, and courts across the nation instituted mediation programs requiring (or, at a minimum, strongly encouraging) mediation as a viable alter-

native in both the federal and state judicial systems.

Given the increasingly high cost of litigation over the past decades, as well as the seemingly endless backlog of civil matters in many state and federal courts, the popularity of mediation and other forms of ADR continued to rise.

By the beginning of the 21st century, ADR was firmly established as a vital, and indeed the predominant, means of resolv-



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ing civil disputes in the United States. Around the same time, with greater internet access came suggestions that online ADR might become “another popular methodology for dispute resolution in the future.”

## The Pandemic Effect

Enter COVID-19. In March 2020, when cities across the country shut down, courts followed suit and closed for all but emergency proceedings. The pace of civil litigation ground to a halt. Although courts are slowly reopening, a significant backlog of cases exists, and criminal and emergency matters must take precedence. Although courts are now hearing civil motions and handling some other proceedings virtually, civil litigants have realized that courts simply do not have the capacity to provide a swift resolution to their disputes.

While ADR was theoretically a viable alternative, in-person proceedings were, at a minimum, strongly discouraged under stay-at-home orders across the country. JAMS and other ADR providers pivoted nimbly to make virtual platforms a standard (and in some instances the only) offering for all forms of ADR. Neutrals were provided extensive training on Zoom. Case managers were trained to serve as moderators, becoming adept at setting up and shepherding sessions as needed. Hotline help desks were established to provide nearly instantaneous assistance with any technical glitches.

Tutorials and practice sessions were (and continue to be) offered to clients to help those unfamiliar with the platforms to feel comfortable with the new medium. With virtual ADR, each session can be tailored to the needs of the parties, with special features, such as multiple breakout rooms or third-party document manage-

ment to make presentation of exhibits seamless.

Additionally, although Zoom is the preferred platform for many proceedings due to its user-friendly interface and capacity for multiple breakout rooms, other platforms are available if the parties prefer.

Initially, clients and neutrals alike approached this new virtual world with some trepidation. Some parties postponed proceedings anticipating that the pandemic would swiftly run its course and in-person proceedings would soon return. Others dipped their toes in the water and gave virtual a try.

By the middle of last summer, however, hopes for a quick fix to the pandemic had gone unfulfilled, and many (if not most) of those initially reluctant to embrace virtual decided it was time to take the plunge.

## Virtual: Pros and Cons

It has now been almost a year since COVID-19 first shut down in-person proceedings. The world of ADR, like that of commerce, government and even many segments of health care delivery, has gone a long way towards adjusting to a virtual new normal. With the passage of time, more and more of the feedback received from those involved in both virtual mediations and virtual arbitrations has been positive, though some still strongly prefer in-person proceedings.

So what are the key concerns expressed by those skeptical about virtual proceedings? At first, there were concerns about how to maintain confidentiality using videoconferencing. Detractors also worried that Zoom and other virtual platforms at best diminish, and at worst obliterate, one's ability to read the body language of those onscreen. Additionally, there were concerns about losing the camaraderie established

by being physically in the same room or physical location. Many feared “Zoom fatigue”—the exhaustion that stems from sitting at one's computer all day while straining to connect with and relate to others across the internet, rather than being in a conference room in an office, where one can casually interact with others in the hallway or over the lunch options while on a break.

While these concerns are real and should be acknowledged, by and large, as explained below, they have not had much of an impact on the effectiveness of virtual proceedings. Additionally, there are significant advantages to virtual proceedings, particularly in practice areas that previously entailed significant travel.

## Privacy/Confidentiality and Other Ethical Considerations

Some commentators (and institutional participants) have raised concerns about privacy and related ethical considerations in connection with virtual technology. As Stephen Gillers, a professor at New York University School of Law, explains, every new communication technology gives rise to questions about protecting confidentiality. Lawyers will always worry about whether technology is “consistent with [their] professional obligations.” Given the professional and ethical importance of maintaining client confidences, this is as it should be.

An initial concern in this vein was Zoom bombing, a phenomenon in which uninvited individuals crash Zoom sessions. In response to this threat to privacy and confidentiality, Zoom quickly created additional security measures to bar uninvited intruders from entry into a session. It is now easy (and indeed the norm) to

password protect sessions, and Zoom's waiting room feature precludes anyone from entering a session absent manual admission by the neutral (or other host). As an additional layer of security, once all invited parties have arrived and been admitted, the session can be locked so that no one else may enter.

Some were also concerned about the potential for sessions being recorded without the participants' knowledge. To meet this concern, Zoom has provided settings that fully allow the recording function to be disabled. Additionally, parties can disable the chat function. This is especially important in arbitrations, where the chat function may be a distraction, or even a temptation to coach a witness.

Some ADR providers, such as JAMS, are using the HIPAA-compliant version of Zoom. This version provides an additional layer of protection for the privacy of all participants.

According to Stephen Schulwulf, with these advances, the ABA has concluded that Zoom is “a safe and effective platform.” Nonetheless, in keeping with their twin duties of competent representation and maintaining the confidentiality of client communications, it is prudent for attorneys to ensure that any platform they use is protected by reasonably sufficient security measures.

To this end, Anthony Davis of Clyde & Co., who also teaches at Columbia Law School, recommends that lawyers vet their chosen platform to verify that it is “safe.” At a minimum, Davis recommends that the platform “have password protection or PINs for whoever enters the conference.” Benham Dayanim of Paul Hastings also recommends using a platform that can lock a proceeding once it has begun.

Retired Judge Gail Andler of JAMS recommends that the parties enter into an agreement specifying both the virtual platform to be used and the specific ground rules regarding confidentiality that are to be followed. Agreements should provide that no one other than those visible onscreen will be in a witness' room while he or she is testifying and that no one other than the examining attorney or arbitrator may communicate with a witness during testimony.

To assuage any doubts about compliance, lawyers and witnesses alike may be asked to demonstrate on camera that their phones and/or other devices are either off or face down and out of reach just before testimony begins. This same technique may be used to ensure that there is no one else in the room where the witness is testifying.

Because the danger of improper recording or surreptitious chatting exists independent of Zoom (via the use of cell phones and other devices), all parties should also agree not to use any device to record, communicate with witnesses during testimony, or otherwise interfere with the proceedings.

Thus, although there are legitimate concerns about using videoconferenced ADR, as with any technology, with a degree of vigilance, attorneys can take reasonable steps to protect against breaches of confidentiality and other unethical conduct during virtual proceedings.

## Reading Body Language/Demeanor

Concerns about the importance of being able to read all the nuances of body language are founded in large part on “[t]he Anglo-American belief in the power of demeanor evidence as a barometer of credibility.”

Although this belief is strongly held in our society, some maintain that it is overrated and subject to cognitive-emotional biases. “What is believable depends . . . on the assumptions and biases of the fact-finder who is evaluating the witness—whether a story seems believable will depend on whether it resonates with the factfinder’s experience of the world.” In that same vein, “[r]eading demeanor across racial lines is particularly fraught.” Thus, it is important not to rely too heavily on impressions based on reading body language, either in person or virtually.

Some have argued that virtual platforms’ muting of body language cues may actually be beneficial. Being virtual can diminish some of the emotional charge associated with facing one’s opponent in person in highly emotional matters. Additionally, civil behavior among the participants may be increased because “participants are literally and figuratively seeing themselves in a mirror.” This self-awareness can also lead one to be more present in virtual mediations.

Additionally, being virtual may diminish emotional reactions due to the less palpable physical posturing of a particularly adversarial opponent. On balance, in at least some matters, although the in-person sense of camaraderie may be dampened, the increased civility may be worth that price.

Moreover, Zoom’s capacity to set up breakout rooms for each party may help build rapport and create a sense of camaraderie, at least among those sharing a breakout room. Additionally, participants may feel more comfortable and relaxed, and therefore less prone to anxiety-driven intransigence, in the familiar territory of their own homes.

Moreover, even if one were to stand by the view that reading body language and assessing demeanor are essential, in-person proceedings currently must be masked. While Zoom may provide less information about the language of the rest of the body, masking removes the entire lower two-thirds of the face—no smiles or frowns or the myriad of expressions in between. So much emotional communication centers on these facial expressions. For this reason, the practice of some insurance carriers requiring their representatives to participate in virtual mediations without video should be reconsidered. Appearing as a black box may depersonalize the representative and create the impression among those appearing onscreen that the insurer is impersonal and disengaged from the process.

In any event, when forced to choose between masked and unmasked communication, many (if not most) people would choose to see a person’s entire face, even if the rest of his or her body (and body language) remains hidden.

## Zoom Fatigue

Zoom fatigue is real; anyone who has spent an entire day in a virtual proceeding, or a series of virtual conferences and/or meetings, has likely experienced it. For this reason, law firms and companies have begun instituting best practices to diminish its effects. In both mediations and arbitrations, it is especially important to schedule regular breaks for the parties and neutral alike, to keep everyone fresh.

Indeed, perhaps because of the aversion to Zoom fatigue, the demand and offer process may be accelerated in virtual mediations, enhancing their efficiency. However, taking regular breaks or even spread-

ing the process over a couple of shorter days may allow for “a more leisurely unfolding of events” and “lead to more productive sessions.”

## Virtual Proceedings Have No Geographical Restrictions

Using virtual platforms has another valuable silver lining: It erases geographical limits. This is a significant positive aspect, in several respects. First, it obviates the need to travel, which decreases costs (in terms of both dollars and in time). Second, and related, is the fact that using a virtual platform increases the likelihood that key decision-makers can attend.

These twin features are especially significant in mediations of business disputes as well as those (both coverage and underlying matters) involving insurance issues. Mediations, in particular, can grind to a halt when the insurance representatives who are present do not have the authority to make decisions about funding and other key settlement issues.

The same may be true of business disputes, in which C-suite personnel may not be able to travel to an in-person mediation and leave behind other significant responsibilities. In person, the telephone chain necessary to convey developments in a mediation to key decision-makers may be too attenuated to keep the negotiation process moving. Instead, discussions may be put on hold for significant periods of time, or even until after the end of the mediation session, before anyone with authority can be reached.

With virtual platforms, party representatives can attend without having to ignore other important aspects of their roles. This allows decision-makers, such as claims executives and CEOs, to be present at the mediation. With those

decision-makers directly involved, negotiations are less likely to be sidelined by an unexpected twist or turn in the day's proceedings. Rather than running new developments up the chain of command through phone reports, the participants in the mediation may be able to make decisions and deal with evolving information and proposals immediately.

A third significant advantage inherent in the absence of geographical limits also exists. The availability of virtual proceedings allows the parties to extend and expand their search for an appropriate neutral

(for example, a mediator or arbitrator with specialized subject-matter expertise). Without the geographic limitations of in-person mediation, participants can explore potential neutrals nationwide (or even internationally). This means that ADR consumers can be more granular in their selection of a neutral, focusing on both optimum timing and specific areas of expertise that may maximize the potential for resolution of their matter.

For example, in matters involving insurance coverage, the parties can choose a mediator

experienced in assessing coverage and bad faith issues, as well as even the specific area of insurance involved. If a suitable mediator in the parties' location is not available to conduct the mediation in the desired time frame, the parties can select an appropriate neutral from another location. Being virtual frees the parties to find, and select from, any number of neutrals who meet the specific needs of their mediation.

### Virtual Is Here to Stay

When the pandemic is over, in-person mediations and arbitrations will no doubt return.

Nonetheless, I share the view expressed by many clients and colleagues alike: Virtual ADR has been effective and is here to stay, though not to the exclusion of in-person proceedings.

In all likelihood, there will be room for both in the future. Some proceedings may combine in-person with virtual in hybrid proceedings. This is especially true in matters where decision-makers might not otherwise be able to attend. Virtual ADR will remain a viable and vital alternative to in-person proceedings—and not necessarily a lesser one. ■

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#### Footnotes:

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- <sup>7</sup> Roger S. Haydock, *Civil Justice & Dispute Resolution in the Twenty-First Century: Mediation & Arbitration Now and for the Future*, 27 Wm. Mitchell L. Rev 744, 748 (2000), also available at: <http://open.mitchellhamline.edu/wmlr/vol27/iss2/40> (noting, "By the end of the twentieth century, litigation became the least used method to resolve common legal problems. Administrative proceedings replaced many judicial cases. Judicial cases usually were resolved through settlement and mediation, and seldom were resolved by trial. Arbitration became the fastest growing method selected by parties to resolve their disputes.")
- <sup>8</sup> E.g., Robert Gordon, *The Electronic Personality & Digital Self*, 56-APR Disp. Resol. J. 8, \*10 (Feb./April 2001). By November 2020, in addition to more traditional mediation and arbitration provided via videoconference, some online ADR services were using less traditional means of resolving cases such as "use blind-bidding or other automated negotiation techniques." See also generally, *Mediation: Law, Policy and Practice* § 15:16, November 2020 Update.
- <sup>9</sup> The author is a neutral at JAMS and has first-hand knowledge of the steps taken there to shift provision of services to virtual platforms. Therefore, the discussion in this section focuses primarily on JAMS. This focus is not, however, meant to suggest that JAMS was alone in taking steps to facilitate the adoption of virtual proceedings. Indeed, at least in major metropolitan areas, both courts and ADR providers alike now use virtual platforms routinely for most civil matters.
- <sup>10</sup> There are a number of different platforms now available for virtual ADR: Cisco Webex, Microsoft Teams, Verizon BlueJeans and Endispute ODR (a pay-for-use platform provided by CourtCall and proprietary to JAMS), to name a few leading examples other than Zoom. The informal consensus seems to be that most of these competitors do not yet have quite the user-friendly flexibility of Zoom. Zoom allows the creation of multiple breakout rooms, each of which is locked to other participants unless the host (generally, after the initial setup, the neutral conducting the proceeding) joins the room or moves another party there. Webex, Teams, and BlueJeans have recently added breakout room capacity (or something akin to it). However, as of the time of this article, these new capabilities do not seem as agile or user-friendly as those on Zoom. Additionally, although Endispute ODR has always had individual breakout room capability, as well as additional security features, like CourtCall, it is operated by professional moderators who stay with the session for as long as it lasts and is more costly as there is an additional fee for its use.
- <sup>11</sup> E.g., Diane M. Welsh, "Why Virtual Is Here to Stay," *The Legal Intelligencer* (January 5, 2021) ("Welsh") (noting the reticence many had at the inception of the pandemic, concerned about whether it would be too daunting to learn the technology and, even more importantly, worrying about whether a virtual platform could be as effective as in-person proceedings).
- <sup>12</sup> E.g., Ellen Rosen, *The Zoom Boom: How Videoconferencing Tools Are Changing the Legal Profession*, ABA Journal June 3, 2020, <https://www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession> ("Rosen"). See also Steve Schulwolf, *Virtual Mediations: My Initial Impressions: Positive Impressions of Settling Cases Online* (April 30, 2020) (pointing to the risk of "Zoombombing" (which has now been addressed through locked sessions and permission-only entry into sessions) and stressing the importance of confidentiality in mediations).
- <sup>13</sup> Rosen.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* Attorneys should also be certain that they (or someone on their team) are sufficiently aware of the platform's features and adept at employing them.
- <sup>16</sup> See *id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> See *id.*

- 20 id.
- 21 Courts have also expressed similar concerns in the context of virtual depositions. E.g., *Alcorn v. City of Chicago*, 336 F.R.D. 440, 443-44 (N.D. Ill. 2020) (requiring that procedures of Federal Rule of Evidence 30 be followed and holding that any video recording to be used as official version of deposition must be certified); *Townhouse Restaurant of Oviedo, Inc. v. NUCO2, LLC*, United States District Court for the Southern District of Florida Case No.19-14085-CIV, 2020 WL 3316021, at \*2 (May 5, 2020) (among other things, ordering that participants in a virtual deposition be barred from using the “chat” function of a videoconferencing platform and stating that “[i]n no event shall the ‘chat’ function be used for any counsel to communicate directly with the witness.”)
- 22 Susan A. Bandes, Neal Feigenson, Virtual Trials: Necessity, Invention, and Evolution of the Courtroom, 68 *Buff. L. Rev.* 1275, 1284 (December 2020) (“Virtual Trials”).
- 23 See, e.g., *id.* at 1284-1290 (noting that the belief is “heavily reliant on dubious folk knowledge” and, quoting Judge Frank Easterbrook’s challenge to the notion that a witness’s demeanor can provide a reasonable means of assessing credibility as having “been tested and rejected by social scientists”).
- 24 *Id.* at 1286.
- 25 *Id.* at 1291.
- 26 The format of virtual platforms can create body language cues that distort “perceptions and interpretations of demeanor.” *Id.* at 1307 For example, if a speaker appears to be looking directly at the viewer, that is almost certainly the effect of the speaker gazing at the camera. *Id.* (noting that we do not yet know enough about how interpretation of emotions across virtual communication may be distorted by misreading the camera’s view).
- 27 Robert Gordon, *The Electronic Personality & Digital Self*, 56-*APR Disp. Resol. J.* 8, 15 (Feb./April 2001) (Noting that limiting nonverbal communication cues may actually provide for more readily understood communications. “People are subjected to a tremendous number of social and nonverbal cues and similar stimuli when they converse with others—a cognitive overload that can often prove difficult to decipher.”)
- 28 See Walsh.
- 29 *Id.* Virtual platforms may, as Walsh puts it, create a sort of “heightened self-awareness.” Viewing oneself as a red-faced talking head, ranting and raving in a little box on a screen, tends to quell the desire to express one’s more choleric nature. See also Steve Schulwolf, *Virtual Mediations: My Initial Impression: Positive Impressions of Settling Cases Online* (April 30, 2020); Nadolna (noting “The strange intimacy of the technology—it can feel like you are very close to the people on your screen—enhances civility in discourse.”).
- 30 See Walsh. Note also that there is also a danger of becoming too engrossed in one’s appearance on-screen
- 31 See Walsh.
- 32 See, e.g., Jawad Fares, Mohamad Y. Fares, Nour Mheidly, Hussein Zalzal, *Effect of Face Masks on Interpersonal Communication During the COVID-19 Pandemic*, <https://www.frontiersin.org/articles/10.3389/fpubh.2020.582191/full> (December 9, 2020) (noting that the middle and lower face are especially communicative of emotion).; Sandy Ong, *How Face Masks Affect Our Communication*, <https://www.bbc.com/future/article/20200609-how-face-masks-affect-our-communication> (June 8, 2020) (without masks, we subconsciously take in “the combined movements” of the eyes and the mouth together when communicating, but we can also learn to adapt our communication skills when masked).
- 33 James Boyle, “Baker McKenzie Fights ‘Zoom Fatigue’ in UK Offices,” *Law 360* (December 10, 2020). For the same reason, presumably, the presentations at this year’s conference have been spread over a number of much shorter days so that no one is spending entire days staring at presenters and Powerpoints on a screen.
- 34 See, e.g., Walsh.
- 35 See Nadolna (noting also that speeding up the process may be a downside in some cases).
- 36 See, e.g., Walsh.
- 37 See Nadolna. Mr. Nadolna recently shared his further thought that participants have not yet fully realized or taken advantage of the full range of choices inherent in virtual ADR scheduling.
- 38 A more minor time-saving feature worth mentioning (at least in a footnote) is the screen-sharing function. This function makes it easy for multiple participants to share a whiteboard and map out calculations and “outside the box” considerations. Similarly, they can share documents and simultaneous review and focus on key sections, rather than circulating a single copy of the document around a conference room table.
- 39 See generally Welsh (noting, “I am convinced that virtual mediation will be with us for a long time period the advantages are too powerful.”); Andrew Nadolna, “Top 10 Things to Like About Virtual Insurance Mediations,” *New York Law Journal* (June 1, 2020) (“Nadolna”) (stating, “Virtual mediation is the newest tool in the insurance alternative dispute resolution (ADR) toolbox, and it is here to stay.”); Steve Schulwolf, *Virtual Mediations: My Initial Impression: Positive Impressions of Settling Cases Online*, April 30, 2020, <https://www.lexology.com/library/detail.aspx?g=927a2649-7502-46f6-94a6-1e3bb9a9830d&l=9AZUWLL> (noting his belief that virtual mediations will ultimately “supplement, but not fully replace, person-to-person mediations”).